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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 274

PAYSOFF TINKOFF, etc.,
Plaintiff-Appellant,

vs.

WEST PUBLISHING COMPANY, a corporation, et al.,
Defendants-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

I.

Jurisdiction and Orders Appealed from.

This is an appeal from an order of the United States Circuit Court of Appeals for the Seventh Circuit, which affirmed the judgment of the Trial Court below, on December 3, 1945, and from a further order denying the Petition for Rehearing, entered on February 8, 1946.

This Petition for Certiorari is filed with this Court pursuant to 28 U. S. C. A. 350.

QUESTIONS PRESENTED.

II.

(A)

The Trial Court has jurisdiction, subsequent to the time allowed to appeal, on a motion made prior thereto to prosecute an appeal in *forma pauperis* and to file a Notice of Appeal, without prepayment of costs, to vacate an order denying the said motion, entered subsequent to the time allowed to appeal, and allow a Notice of Appeal to be filed *nunc pro tunc*, as of the date the original motion was made.

(B)

The Court, even after term time, has inherent jurisdiction to vacate orders, to prevent a fraud being practiced upon the Court, or to prevent a failure of justice.

(C)

The Appellate Court is solely bound by the Record, and has no jurisdiction to make findings of fact or conclusions of law outside of the record.

STATEMENT OF FACTS.

The United States Circuit Court of Appeals in its opinion, promulgated on December 3, 1945 ignored the fact that the Trial Court *retained* jurisdiction to enter an order subsequent to the Term Time relating to the perfection of

the appeal, which Petitioner was unable to perfect because of his inability at that time to raise $5.00 to pay the appeal costs with the Trial Court by December 28, 1942, when the Court said (R. 30):

> "The Court: No, I will enter Mr. Hagstrom's Trial Order, and I have the assurance that he will not take advantage of you, Mr. Tinkoff, because of the failure to pay the Appeal Costs on Dec. 28, 1942, though same was paid on Jan. 2, 1943. Both your rights, Mr. Tinkoff and Mr. Hagerstrom, will be fully protected by this Order. *If any question arises in the Appellate Court on this matter, then I can consider same, when it is brought to my attention.*" (Italics Supplied).

That the final date to file the appeal would have expired on December 28, 1942, and four days prior thereto, the Trial Court did, on December 24, 1942, enter the following order (R. 20):

> "It is ordered by the Court that the motion of the Plaintiff for an order allowing him to prosecute his appeal as a poor person and *to allow him to file his notice of appeal* and to direct the Clerk of this Court to prepare and certify the Records, per the Praecipes to be filed, *without prepayment of costs,* be and it is hereby continued to December 29, A. D. 1942." (Italics Supplied.)

That the Trial Court on December 29, 1942 entered the following order (R. 22):

> "It is ordered by the Court that the motion of the Plaintiff to enter an order allowing him to prosecute his appeal as a poor person, and *to file his notice of appeal* and to direct the Clerk to prepare and certify the record, *without prepayment of costs,* be and it is hereby continued to January 4, A. D. 1943." (Italics Supplied.)

That the Court, on January 6, 1943, entered the order, as of January 4, 1943, presented by the Appellees, denying the motion of the Petitioner-Appellant presented on December 24, 1942 to prosecute his appeal as a poor person, *to file his Notice of Appeal* and to direct the Clerk to prepare and certify the record *without the prepayment of costs.*

That the Trial Court on October 14, 1943 did enter the order vacating the order of January 4, 1943, aforementioned and allowed the Plaintiff's Notice of Appeal to be filed *nunc pro tunc* as of December 24, 1942, which order of October 14, 1943 is as follows (R. 38):

> "On motion of Paysoff Tinkoff, Plaintiff appearing *pro se* it is ordered that the order entered herein on January 4, 1943 be and the same is hereby vacated and set aside and that leave be and is hereby granted to said plaintiff to file notice of appeal *nunc pro tunc* as of December 24, A. D. 1942."

That the Court did subsequently on October 27, 1943 approve and make part of the record the Report of Proceedings of January 4, 1943 and January 6, 1943 (R. 30), said order being as follows:

> "This Report of Proceedings is hereby marked Presented in Open Court on Oct. 27, 1943.
>
> /s/ Philip L. Sullivan
> Judge."
>
> This Report of Proceedings is hereby Approved and made part of the Record in this proceeding on ..... 1943.
>
> /s/ Philip L. Sullivan
> Judge."

That the Court in entering the order presented to the Court on January 6, 1943 by the Appellees, stated that the same was being entered on condition that the Petitioner-Appellant's appeal would not be prejudiced, and further

that the Court retained jurisdiction should the question relating to said appeal arise, same being shown on page 30 of the record, as follows:

> "The Court: I will be the last man to deprive a litigant of his right to appeal, especially when he is endeavoring to sue as a Poor Person. I will enter your Draft Order, Mr. Hagstrom, with the specific understanding that no objection will be made by you to Mr. Tinkoff's appeal, *because his Notice of Appeal was not filed prior to December* 28, 1942, because of his inability to pay the appeal costs. *Every man should have his day in Court, and his appeal is part of that right.* (Italics Supplied.)
>
> "Mr. Tinkoff: ..*But this is a jurislictional question. Can the order show that the Notice of Appeal is filed nunc pro tunc as of December* 24, 1942. The payment of appeal costs is not jurisdiction *but the filing of the Notice of Appeal is. Your honor will note that my motion was made on December* 24, 1942, *four days before December* 28, 1942; and had your Honor acted on December 24, 1942, and denied the motion, I would have had four days to get the appeal costs of $5.00; but this motion was continued to January 4, 1943, and the appeal costs paid on January 2, 1943.
>
> "The Court: No, I will enter Mr. Hagstrom's order, and I have his assurance *that he will not take advantage of you, Mr. Tinkoff, because of the failure to pay the appeal costs on December* 28, 1942, *though same was paid on January* 2, 1943. Both your rights, Mr. Tinkoff and Mr. Hagstrom, will be fully protected by this order. *If any question arises in the Appellate Court on this matter, then I can consider the same, when it is brought to my attention.*" (Italics Supplied.)

The question relating to jurisdiction did not arise until the cause came up for argument on the first appeal on October 11, 1943, when the Appellate Court on its own motion raised the fact that the Appellate Court had no jurisdiction,

because the appeal was not filed on time per the record filed.

That your Petitioner did immediately thereafter file a Petition to vacate the Order of January 4, 1943, and to enter the Notice of Appeal, *nunc pro tunc*, with the Trial Court, on Notice, duly given to the defendants,—who did not appear or object to said motion,—and the Trial Court did then and there on October 14, 1943 enter an order vacating and setting aside the order of January 4, 1943, and did grant leave for plaintiff to file his Notice of Appeal nunc pro tunc as of December 4, 1942, as previously mentioned.

That the said Trial Court subsequently did enter an order on October 27, 1943 that the said Report of Proceedings of the hearing on January 4, 1943 and January 6, 1943 be made part of the record (R. 30), as previously mentioned.

That the Appellees did, under date of November 15, 1943 (R. 45, 46) file Objections with the Appellate Court to allow the Supplemental Record to be filed to show the Trial Court's action of October 14, 1943, and October 27, 1943 to be made part of the record in the original appeal, and further said Appellees contended there should be no hearing on the merits because the Court lacked jurisdiction. *in that Notice of Appeal was not filed in time,* which statement of the said Appellees was contrary to the promises made by said Appellees to the Trial Court (R. 30), when the Appellees motion of January 4, 1943 was entered by the Court denying the Petitioner-Appellant's motion to prosecute his appeal as a poor person, and to file his Notice of Appeal and prepare the Record without the prepayment of costs.

These facts, as stated above, the Circuit Court of Appeals wholly ignored, and the facts as alleged in the record were not contradicted.

The Circuit Court of Appeals in its opinion stated:

> "Irrespective of whether a pauper's petition filed within the three months is a sufficient basis upon which to predicate a *nunc pro tunc* pre-dating a Notice of Appeal actually filed on January 2, 1943 to December 24, 1942, *we are convinced there is no fact showing sufficient to warrant the nunc pro tunc pre-dating.*" (Italics supplied).

This statement and finding of the Appellate Court is contrary to the record, wherein the Trial Court entered the orders vacating the order of January 4, 1943 to allow the Petitioner's Notice of Appeal to be filed as of December 24, 1942, when the motion was made, instead of January 2, 1943 when the appeal costs of $5.00 was paid. (See R. 28-30). The Appellate Court further said:

> "As an added reason there was an abandonment of the petition for leave to prosecute the appeal as a pauper, by the voluntary payment, subsequent to the three month period, of the filing fees for the appeal."

This statement is not supported by the record. The payment of the filing fee did not in any way constitute an abandonment of the Petitioner's Petition to prosecute his appeal as a pauper, because the said payment related to only one step of the appeal, to-wit, the filing fee, and did not relate to the balance of the appeal, like costs of the certification and preparation and printing of the record; and further did not relate to the motion for leave to file the Notice of Appeal.

The Appellate Court further said:

"It was this Court, on its own motion, which dismissed the appeal because it was without jurisdiction."

That statement is not supported by the record, because the Trial Court would not, on the motion and petition filed with said Trial Court, then and there enter the said order October 14, 1943 to vacate the order of January 4, 1943, denying the motion to prosecute the appeal as a poor person, and grant leave to file the Notice of Appeal *nunc pro tunc* as of December 24, 1942; and the further fact is that the Appellees themselves did not object to the entry of this order, and that the Appellate Court on its own motion maintained it had no jurisdiction, contrary to the facts as stated in the record, and as found by the Trial Court, that the Trial Court retained jurisdiction pending the appeal should any question arise relating to said appeal, regarding the entry of its order of January 4, 1943. (R. 30)

The fact whether the Appellate Court had jurisdiction to entertain the appeal was to be based upon the record as found by the Trial Court and not upon the findings of the Appellate Court, disregarding the record of the Trial Court, when the Trial Court endeavored to correct its record to speak the truth, and the Appellate Court erred in the original appeal in not allowing the supplemental record to be filed under Rule 75-H of the Federal Rules of Civil Procedure.

Conclusion.

The Petitioner-Appellant respectfully submits that the Circuit Court of Appeals erred in making its findings and conclusions of law on facts not supported by the record, in not finding as a fact that the Trial Court had allowed the appeal to be filed *nunc pro tunc* as of the date the motion was filed, to-wit, on December 24, 1942, and further in not finding that the Petitioner-Appellant's appeal has been lost, not through any fault of his own, but solely due to the fact that the Appellate Court has ignored the agreement made by the Appellees with the Trial Court that the said appeal of the Appellant should not be prejudiced by the Trial Court entering the order of the Appellees; and that the said Trial Court had inherent jurisdiction, even after Term time, to prevent a miscarriage of justice, which the Appellate Court is causing the Appellant, by ignoring the actual findings of the Trial Court, contrary to Rule 75-H of the Rules of Civil Procedure aforementioned.

Wherefore your Petitioner prays that this Court issue its Writ of Certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit, to certify its record in this proceeding, to be reviewed by this Court, so that this Court may examine any errors which may exist in the said record, and Petitioner further prays for such other and further relief as may be just.

Paysoff Tinkoff,
Petitioner-Appellant.

State of Illinois
County of Cook—ss.

Paysofi Tinkoff being first duly sworn deposes and says that he is the Petitioner-Appellant herein; that he has read the foregoing Petition for Writ of Certiorari by him subscribed, and that all of the allegations made therein are true as alleged.

PAYSOFF TINKOFF.

Sworn to and Subscribed
before me this 3rd day
of July, A. D. 1946.

E. L. Coburn,
Notary Public
Notary Seal

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

III.

The Propositions of Law raised with the authorities, are the following.

(a)

The failure of the Appellant to file his appeal prior to December 28, 1942 was due to the action of the Trial Court in continuing the motion of the Appellant to prosecute his appeal *"in forma pauperis"* on its own motion.

4 C. J. S. 932.

Solomon v. *U. S.*, 297 Fed. 314.

Schrenkeisen v. *Kishbaugh*, 162 Pa. 45, 29 Atl. 284.

Willson v. *Henderson*, 15 How. Prac. (N. Y.) 90.

(b)

The failure to file the Notice of Appeal on December 24, 1942, within the three month period, was due to the accident and mistake of the Appellees, and not due to any fault of the Appellant.

4 C. J. S. 932.

The Ruth—20 Fed. (2) 314.

(c)

The prepayment of appeal costs is not necessary to give the Appellate Court jurisdiction, if the Notice of Appeal is tendered to be filed, with the clerk.

Jennings v. *Johnson*, 148 Fed. 337.

Weaver v. *Blair*, 19 Fed. (2) 16.

(d)

The Trial Court retained jurisdiction to enter the order, on October 14, 1943, to vacate the order of January 4, 1943.

Zimmern v. *United States,* 298 U. S. 167 (56 Sup. Ct. Rep. 706).

(e)

The Trial Court, and the Appellate Court had inherent jurisdiction, even after term time, to vacate orders, to prevent a fraud being practiced upon the parties or the court.

Palmyra, The, 12 Wheat. 1, p. 10.

Matton Steam Boat Company, Inc. v. *Murphy,* 63 S. C. 1126.

Alviso v. *U. S.,* 73 U. S. (6 Wall.) 467.

U. S. v. *Vigil,* 77 U. S. (10 Wall.) 423.

Cardona v. *Quinones,* 240 U. S. 83.

U. S. v. *Gomez,* 70 U. S. (3 Wall.) 753.

Tesconia v. *U. S.,* 141 Fed. (2d) 811.

(f)

The Appellate Court could make no findings of fact or conclusions of law, outside of those alleged in the record.

IV.

ARGUMENT.

(A)

The Appellate Court could make no findings of fact or conclusions of law outside of that incorporated in the Record.

The facts conclusively show that the Trial Court retained jurisdiction in order to protect the rights of the Petitioner-Appellant to prosecute his appeal, should the situation so arise subsequent to the entry of the order of January 4, 1943 (See Record 30).

The original order of December 24, 1942 (R-20) contained the motion of the Petitioner-Appellant not only to prosecute his appeal as a poor person, but also *for leave to direct the Clerk of the Court to allow the Petitioner to file his Notice of Appeal without prepayment of costs,* which the Clerk had previously refused to do, contending that the payment of costs was a condition precedent to the Petitioner filing his Notice of Appeal.

The Record further shows that the Trial Court specifically stated that it desired that the Petitioner should not be deprived of his right of appeal, or his Appeal prejudiced, especially when Petitioner was endeavoring to sue as a poor person, and further the Trial Court stated that every person should have his day in Court, and his appeal is part of that right (R-30).

The Circuit Court of Appeals in its opinion of December 3, 1945 wholly ignored these facts, and further ignored the

fact that the Defendants-Appellees on November 15, 1943 objected to having the Appellate Court hear this proceeding on the merits, and to allow Petitioner to file his supplemental record to show that the Notice of Appeal was filed in time.

The Circuit Court of Appeals said:

> "It was this court, on its own motion, which dismissed the appeal because it was without jurisdiction."

This finding is contrary to the record in both fact and law.

The question whether the appeal was filed within time, as a matter of law, is to be based upon the record, as determined by the Trial Court; and the Circuit Court of Appeals determined as a matter of law, from the facts not shown by record, that the appeal was not filed in time.

The facts here conclusively show that the Trial Court not only retained jurisdiction to preserve Petitioner's appeal, but also when the same was brought to the Trial Court's attention,—the Appellees not only did not object, but did not appear,—and the Trial Court entered the order, pursuant to the previous understanding with the Appellees, that Petitioner's appeal should not be lost by the entry of the order of January 4, 1943, and thus vocated the order of January 4, 1943, and allowed the notice of Appeal to be filed *nunc pro tunc*, as of December 24, 1942.

Of vital importance is the fact that Petitioner sought not only to prosecute his appeal as a poor person, but also sought *leave to file his Notice of Appeal on December* 24, 1942 *without prepayment of costs, which the Clerk refused to do.*

The Petitioner respectfully submits that the record here shows that the Trial Court retained jurisdiction to prevent the Petitioner from losing his appeal because of his inability to pay the appeal costs of $5.00, and further that the continuances of these motions from December 24, 1942 to January 6, 1943, was on the Trial Court's own motion, and not on the motion of either of the parties.

As hereinafter shown, the Trial Court, under the facts alleged, retained inherent jurisdiction to correct the record so as to speak the truth, and allow an appeal to be filed, if motion is made within the time, so as to prevent not only a miscarriage of justice, but also a failure of justice (See *U. S.* v. *Gomez,* (70 U. S. (3 Wall. 753).

The Circuit Court of Appeals further makes the finding as follows:

> "As an added reason there was an *abandonment* for leave to prosecute the appeal as a pauper, by the voluntary payment, subsequent to the three month period, of the filing fees for the appeal." (Italics supplied)

As shown above, the motions presented to the Trial Court on December 24, 1942, within the appeal time, was not only a motion to prosecute the appeal as a poor person, *but also a motion for leave to file a Notice of Appeal without prepayment of costs,* and further, for the Clerk to certify the record pursuant to the Praecipe without the prepayment of costs.

The record shows that the Petitioner at no time endeavored to abandon any of his rights, and the doing of the act in paying the filing fee of $5.00, waived the right which related to the payment of $5.00 costs only, *did not waive or abandon the jurisdictional right of filing the Notice of Ap-*

peal as of December 24, 1942, *when the motion was made,* and this was specifically called to the Trial Court's attention (R-30), by the Petitioner, when Petitioner said as follows:

> "Mr. Tinkoff: But this is a jurisdictional question. Can the order show that the Notice of Appeal is filed *nunc pro tunc* as of Dec. 24, 1942. The payment of Appeal Costs is not jurisdictional but the filing of the Notice of Appeal is. Your Honor will note that my motion was made on Dec. 24, 1942, four days before Dec. 28, 1942; and had your Honor acted on Dec. 24, 1942, and denied the motion, I would have had four days to get the Appeal Costs of $5.00; but this motion was continued to Jan. 4, 1943, and the Appeal Costs paid on Jan. 2, 1943.
>
> "The Court: No, I will enter Mr. Hagstrom's Order and I have his assurance that he will not take advantage of you, Mr. Tinkoff, because of the failure to pay the appeal Costs on Dec. 28, 1942, though same was paid on Jan. 2, 1943. Both your rights, Mr. Tinkoff and Mr. Hagstrom, will be fully protected by this Order. If any question arises in the Appellate Court on this matter, then I can consider same, when it is brought to my attention."

The Trial Court therefor was advised of the difference between the jurisdictional question and the non-jurisdictional question, and in the face of that, as stated above, the Trial Court entered the order at the urgent request of the Appellees, with the specific reservation that the Petitioner's appeal should not be prejudiced.

Therefore, the Petitioner states that the Circuit Court of Appeals in making a finding of abandonment, made a finding inconsistent with the facts alleged in the record, and therefore committed error.

The Circuit Court of Appeals further stated in its opinion:

> "Irrespective of whether a pauper's petition filed within the three months is a sufficient basis upon which to predicate a *nunc pro tunc* pre-dating a notice of appeal actually filed on January 2, 1943 to December 24, 1942, *we are convinced there is no fact showing sufficient to warrant the nunc pro tunc pre-dating.*" (Italics Supplied.)

This finding of fact by the Appellate Court that there was *no fact showing* sufficient to warrant the Trial Court in making the *nunc pro tunc* order, wholly ignored the facts previously stated of the various orders made by the Trial Court on the motions pending, especially *the motion for leave to file the Notice of Appeal without the prepayment of costs, made on December* 24, 1942.

Based on the facts as shown by the record, *this motion for leave to file the Notice of Appeal on December* 24, 1942, and the said costs being paid prior to the disposition of the motion on January 4, 1943, to-wit, on January 2, 1943, certainly would not constitute an abandonment of Petitioner's appeal, by doing the very act of paying the appeal costs of $5.00 which the Petitioner requested the Court to defer to a subsequent time, as the payment of Costs is non-jurisdictional, and the filing of the Notice of Appeal is jurisdictional.

Petitioner respectfully submits that the Circuit Court of Appeals, in its opinion wholly ignored the material facts shown in the record, and based a conclusion on facts outside of the record.

The Appellate Court in dismissing this appeal on the ground that it lacked jurisdiction,—and not on any motion made by the Appellees,—shows that the said action of the

said Circuit Court of Appeals, was wholly unwarranted, as not being based upon the record, and therefore this Supreme Court should direct that the said order of the Appellate Court, be vacated and set aside; that the appeal be allowed, and that a hearing be had, by the Appellate Court, upon the merits, so as to prevent a failure and miscarriage of justice.

Petitioner further submits upon the authorities hereinafter cited shows that the appeal was filed within time, and further that the prepayment of costs is a non-jurisdictional question, and the only jurisdictional question is the filing of the Notice of Appeal, which Petitioner was prevented from doing by his inability to pay the costs on December 24, 1942.

(B)

The Appellant's Appeal was filed in time. ....

The record conclusively shows that the petition to sue *in forma pauperis* was filed on December 24, 1942, four days prior to the expiration date, from the time of the denial of the petition to vacate the order of dismissal entered on September 28, 1942 (R. 16, 18).

The court on its own motion continued the acton to January 4, 1943 (R. 22), and agreed to allow the appeal, on January 4, 1943 (R. 29), where the court sad: "*I will allow his appeal to be filed, but I want a draft order prepared, and come in on notice.*"

On January 6, 1943 the court entered the order prepared by the Appellees, in order to avoid prejudicing the Appellees' rights (R. 29-30), and denied entering the order

prepared by the Appellant (R. 32), since the court believed that the Appellant's rights would not be prejudiced thereby.

Prior to January 4th, to-wit, on January 2, 1943 the Appellant paid the appeal costs.

It is therefore apparent that the failure to pay the appeal costs, or to have an order entered within the statutory period, due to the court's own action in delaying such decision, does not affect the jurisdiction of the appellate court, since the jurisdictional fact is whether the notice of appeal was endeavored to be filed with the court, or the clerk, which the latter refused to file due to not obtaining the appeal costs in advance; and therefore, as this question was not jurisdictional, the court in the hearing of this cause, Docket 8273, in dismissing this cause due to the record failing to show that the appeal was taken in time, had deprived the Appellant herein from raising the issue in the Appellate Court in the preceding trial, as to whether the Trial Court was in error in entering the order which it actually did; and further, that this court was in error in not allowing the Appellant herein, in the former proceedings, to amend the record pursuant to Rule 75(h) of the Federal Rules of Civil Procedure, by incirporating therein, in the designation of Record, the report of proceedings; and further showing that the Trial Court, on motion duly made, when it was advised that the Appellant's rights were prejudiced in the Appellate Court, did then and there vacate the order of June 4, 1943, and allowed the appeal to be filed as of December 24, 1942. (See Rec. 34 to 38, inc.)

That Rule 75 (H), of the Federal Rules of Civil Procedure, says in part as follows:

"... If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties on stipulation, or the district court, either before or *after* the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court." (Italics supplied.)

The Appellees, contrary to their promise to the Trial Court, contended in the Appellate Court in the prior proceedings, No. 8273, that this Court had no jurisdiction because the appeal was not taken in time, and the net result of the whole proceeding was that the Appellant, even after filing of Briefs and Arguments had in this proceedings, was deprived of his appeal, in having the same dismissed for want of jurisdiction.

In the case of *Solomon* v. *United States*, 297 Fed. 82, the court held in substance as follows:

"As the writ of error was presented for allowance within the time limited by statute, and the delay in the allowance and issuance of the writ was due to the action of the court and not of the plaintiff in error, its allowance is to be regarded as having been made as of the date of the presentment of the writ, rather than as of the time when it was in fact allowed."

The Supreme Court of Pennsylvania, in the case of *Schrenkeisen* v. *Kishbaugh*, 162 Pa. 45, 29 Atl. 284, in deciding this point, said as follows:

"But where, in due and regular course, the case comes before the court for its action, whether interlocutory or final, the court has an inherent and necessary power to stay all proceedings, including the run-

> ning of the statutory period of appeal, while the matter is resting *sub judice*. Otherwise, no motion could be made, or relief in any form asked, without risk that time ocupied by the court in necessary deliberation, or in more urgent business, might deprive the party of his rights without fault of his own, and without remedy."

The author in 4 C. J. S. Page 933 Note 99, referring to the case of *Schrenkeisen* v. *Kishbaugh*, says:

> "During pendency of rule for appeal *'in forma pauperis'*, the Court has been held to have power to stay the running of the statutory period",

and the court in the case of The Rule—20 Fed. (3) 314, held as follows:

> "Delay of the court in allowing appeal seasonably applied for, cannot defeat right of appeal".

The facts conclusively show that the petition to prosecute the appeal *"in forma pauperis"* was presented to the court on notice duly given to the opposing counsel on December 24, 1942, and, on the court's own motion, continued several times till January 4, 1943, and that in the interim, on January 2, 1943, the Appellant paid the five dollars ($5.00) appeal costs, and the notice was then filed, and that this fact was called to the court's attention on January 4, 1943, and the court did then and there state that it was of the opinion that the appeal had been properly filed and that the Appellant's right to the above would not be prejudiced, and that jurisdiction was retained by the court to protect the Appellant in his appeal, and that the appeal was therefore filed in time.

(C)

The Trial Court retained jurisdiction after Term Time, to enter the Order.

The Appellant further represents that the Trial Court had jurisdiction on the date of October 14, 1943 to enter the order vacating the order of January 4, 1943, allowing the plaintiff to file his appeal *nunc pro tunc* as of December 24, 1942, since the court in entering the order of the Appellees, at the earnest behest of the Appelees, on January 6, 1943, as of January 4, 1943, retained jurisdiction when the Trial Court said (R. 30):

> "If any question arises in the appellate court on the matter, then I will consider same when it is brought to my attention."

Also the court further said:

> "No, I will enter Mr. Hagstrom's order (appellees), and after his assurance that he will not take advantage of Mr. Tinkoff because of failure to take care of the appeal costs on December 28, 1942, though same were paid on January 2, 1943. Both of your rights, Mr. Tinkoff's and Mr. Hagstrom's will be fully protected by this order."

The Supreme Court of the United States in the case of *Zimmern* v. *United States,* 298 U. S. 167, 56 Sup. Ct. Rep. 706, held in substance that a trial court can retain jurisdiction over its judgments and orders to act on the same in a subsequent term, when such intention is shown by the trial court in the entry of the order, when such judgment or order was entered in the prior term.

It is therefore apparent that·

1. The failure to pay costs was not a jurisdictional defect, and

2. That the failure of the court to act on the motion filed within the time provided for appealing was not a jurisdictional defect, and that

3. That due to the act of the Defendants (Appellees) the Appellant was deprived of his right to present to Appellate Court the error of the Trial Court in entering the motion requested by the Defendants-Appellees, and

4. Since the rights of the Appellant to appeal, or to have his Appeal heard, was lost solely due to the insistence of the Appellees to enter an order urged by the Appellees, the Appellant has been deprived of his appeal not only by fraud practiced upon Appellant, but also upon the Trial Court.

(D)

The prepayment of costs is not jurisdictional.

The Supreme Court of the United States has held that the prepayment of a filing fee is not a condition precedent to the attaching of jurisdiction to the Appellate Court, or any court, in a legal proceeding, and especially in an appeal, and this has been so held in the case of *Jennings* v. *Johnson*, 148 Fed. 337, when the Court said:

> "The clerk of the Circuit Court is not authorized by law to require an Appellant to pay the costs which accrue to him and the marshall prior to the appeal as a condition precedent to its transmission of the record to the Appellate Court",

and the court in the case of *Weaver* v. *Blair*, 19 Fed. (2) 16, said:

"Petition for redetermining deficiency in Income Tax payment held properly filed within statutory period, notwithstanding non-payment of filing fee fixed by Board".

The court in *Martin* v. *Clarke*, 105 Fed. (2) 685:

"The object of a Notice of Appeal is to advise the opposite party that the Appeal has been taken from a specific judgment in the particular case".

(E)

The Trial Court, and the Appellate Court, had inherent jurisdiction, after term time, to vacate orders, to prevent a fraud being practised upon the parties or the Court.

The Supreme Court, in the case of *Matton Steamboat Co., Inc.*, v. *Murphy* 63 S. Ct. 1126 on 1128 said:

"Here Appellants' applications to the chief justice of the court of appeals were timely, and could have been allowed by him either before or *after* the expiration of the three (3) months' priod."

The Supreme Court, in the case of *Alviso* v. *United States* 73 U. S. (6 Wall.) 457 and 458, Mr. Justice Nelson said:

"As the omission to return the citation appears to have arisen from the neglect of the clerk, if it had been shown that it remained in the office, a certiorari would have been sent down on a prayer of diminution; but as it has been satisfactorily proved to have been lost or destroyed, it is not a case for certiorari.

"The Palmyra (12 Wheaton 10) is an authority for granting the relief sought at the succeeding Term of the Court in a case like the present. In that case, when the cause was called at the February Term, 1825, upon an inspection of the record, it did not appear from the transcript, that there had been a final decree rendered

in the court below, and for this reason the appeal was dismissed. At the next term, it having *been shown that the omission was the error of the clerk in making out the transcript, the cause was reinstated on the docket.* Mr. Justice Story says, 'The reinstatement of the cause was founded, in the opinion of the court, upon the plain principles of justice, and in according to the known practice of other judicial tribunals in like cases.' "

The Supreme Court, in the case of *United States* v. *Vigil* 77 U. S. (10 Wall.) 423 on p. 427, said:

"The prayer of an appeal in due time, although not granted then by the court, secures this right, and no delay by the court in its allowance can impair it. The order nunc pro tunc contains the allowance—".

The Supreme Court, in *Cardona* v. *Quinones*, 240 U. S. 83 on pages 83 and 84, said:

"As the appeal was prayed within the statutory time, the mere date of the allowance by the Court is not controlling, and a motion to dismiss, which proceeds upon a contradictory assumption, is therefore without foundation, and is therefore overruled."

The Supreme Court, in the case of *U. S.* v. *Gomez* 70 U. S. (3 Wall.) 753 on Page 763 and 764, said:

"Certain exceptions to the general rule are recognized and allowed, which are as well established as the rule itself. They are admitted as indispensable limitations to guard *against fraud and circumvention, and to prevent a failure of justice.*

"*Where the appellant, having a seasonably procured the allowance of the appeal,* is prevented from obtaining the transcript by the fraud of the other party, or by the order of the court, or by the contumacy of the clerk, the rule does not apply, provided it appears that the Appellant was guilty of no laches, or want of diligence, in his efforts to prosecute the appeal."

The court, in the case of *Tesconia* v. *U. S.* 141 F (2) 811 on page 812 says:

> "Petitioner's application to the lower court for leave to appeal in forma pauperis constituted a sufficient petition for leave to appeal (*Steffler* v. *U. S.* 319 U. S. 38, 63 S. Ct. 948, 87 L. ed. 1197), and having been filed and presented to the Court within three months of entry of the order, it was timely and sufficient to preserve petitioner's right of appeal. *Cardona* v. *Quinones*, 240 U. S. 83, 36 S. Ct. 346, 60 L. ed. 538."

From the above decisions of the Supreme Court, and the Circuit Court of Appeals, it is apparent that the Courts have inherent power to prevent injustice and to do justice, and further, to correct a mistake if one has been made.

The record shows that your Petitioner has exercised due diligence, has not been guilty of any laches or negligence, and that the act of the Trial Court was solely induced by the Appellees, and that the Trial Court, immediately upon being informed of the facts, corrected the record so as to speak the truth. That the Trial Court did then and there immediately, upon notice duly made, and petition filed, enter an order vacating the order entered at the insistence of the Appellees, and did enter the order allowing the appeal to be filed *nunc pro tunc* as of December 24, 1942, *based on the pending motion for leave to file the Notice of Appeal, without prepayment of costs* in pursuance to the jurisdiction reserved at the time of the entry of the order at the insistence of the appellant on January 4, 1943 (R. 30), shows the Court's intention to allow the Appellant his right to appeal.

As the Appellant had lost his right to appeal, due to the fault of the Appellees, and as the statute of limitations

has run in the meantime, which would have prevented the Appellant from instituting another proceeding on the ground that there was no hearing on the merits, the only relief to the Appellant, in order to have the questions of law presented in this proceedings decided by the court, would be to vacate the order of dismissal previously entered; and on hearing and argument enter another order pursuant to the law and facts, from which either party could then appeal to protect his rights, as by law provided.

The court retains inherent jurisdiction to protect its own records and it dignity, and especially will not be a party to any fraud. The lapse of time, or the term, does not affect the court's jurisdiction in entering an order to prevent fraud, where the court itself was imposed upon.

The Appellant respectfully submits that the Appellate Court erred in entering its order of December 3, 1945, aforementioned.

Conclusion.

The Petitioner-Appellant respectfully submits that the Appellate Court erred in affirming the judgment of the Trial Court, which dismissed Petitioner's Petition on the sole ground that the Petitioner's appeal was not filed within the statutory period of three months, to-wit, prior to December 28, 1942.

The Petitioner has shown, as a matter of law, that the said appeal was filed four days prior to the statutory period, to wit: on December 24, 1942 and further that a fraud was practiced upon the Court by the Appellees on November 15, 1943, when they filed their Petition in the Appellate Court, objecting to Petitioner's motion that the cause be heard on the merits, and further objecting to Petitioner's motion for leave to enter an order to file a supplemental record pursuant to Rule 75-H of the Federal Rules of Civil Procedure, to incorporate the orders of the Trial Court of October 14, 1943 and October 27, 1943, into the record.

Your Petitioner respectfully submits that he has been deprived of his appeal on the merits in this proceeding, not because of the conduct of the Trial Court, not on an original motion of the Appellees, but solely on the action of the Appellate Court itself, in refusing to entertain jurisdiction, on the ground that it had no jurisdicton because the said appeal was not filed in time; wholly disregarding such findings as made in the record in this proceeding, which was binding on the said Appellate court, which in truth and in fact, showed that the Appeal was filed, as matter of law, on December 24, 1942, four days prior to the Statutory period to appeal.

The above is respectfully submitted,

PAYSOFF TINKOFF,
Petitioner-Appellant.

OPINION.

IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 8878 — October Term and Session, 1945.

Paysoff Tinkoff, individuallyand as Assignee, of Paysoff Tinkoff & Co. and Paysoff Tinkoff & Son Co., *Plaintiffs-Appellants,*

vs.

West Publishing Company, a Minnesota corporation, and The American Law Book Company, a New York corporation, *Defendants-Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

December 3, 1945.

Before Evans, Sparks and Major, *Circuit Judges.*

Per Curiam. Plaintiff appeals from an order entered January 30, 1945, denying his motion to "vacate the order of dismissal entered on August 28, 1942, and the order denying the motion to vacate entered on September 28, 1942 due to fraud being practiced upon this Court."

An appeal from the original order of dismissal was dismissed by this Court on October 26, 1943, because not taken in time. 138 F. 2d. 607. The facts as stated there disclose an attempted appeal from orders of August 28, 1942 and September 28, 1942, by a notice of appeal filed January 2, 1943.

It is plaintiff's contention that inasmuch as he filed a petition for leave to proceed in forma pauperis on December 24, 1942, which day was within the three months' period for appeal, his appeal was timely, even though the petition was subsequently denied (after two continuances) January 4, 1943. Pending the consideration of this petition to proceed as a pauper, Tinkoff, actually filed a notice of appeal and paid the costs therefor, on January 2, 1943 which was however more than three months from the date, of entry of either order. Between the time of the first argument and this court's opinion (October 11 and October 26, 1943, respectively), the District Court, on October 14, granted Tinkoff's motion that the appeal be filed *nunc pro tunc* as of December 24, 1942 (the date of filing of the petition to proceed as a pauper).

Plaintiff argues that defendants' counsel committed a fraud on the court when it moved in this court for a dismissal of appeal. Our records disclose the motion to dismiss the appeal was invoked at the court's own instance, not on motion of counsel.

Irrespective of whether a pauper's petition filed within the three months is a sufficient basis upon which to predi-

case a *nunc pro tunc* order pre-dating a notice of appeal actually filed on January 2, 1943 to December 24, 1942, we *are convinced there is no fact showing sufficient to warrant the nunc pro tunc pre-dated.* As an added reason there was an abandonment of the petition for leave to prosecute the appeal as a pauper, by the voluntary payment, subsequent to the three month period, of the filing fees for the appeal. (Italics Supplied.)

We find no basis for the argument that a fraud was perpetrated upon the trial court or upon plaintiff by the defendants' counsel. It is immaterial that defendants' counsel stated he was objecting to the *nunc pro tunc* order not on the ground that it was but a few days late, but that plaintiff had not appealed from the final order but from the order refusing to vacate the final order. In this court defendants apparently stood by their word and did not raise the issue that appeal was too late. It was this court, on its own motion, which dismissed the appeal because it was without jurisdiction.

The trial court correctly denied the motion to vacate the August and September, 1942 orders for the reason that no fraud was practiced either upon the court or upon plaintiff's counsel.

The judgment is Affirmed.

A true Copy:

Teste:

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Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.